presented his acceptance of a submission made by counsel for the plaintiff that recently the High Court has made awards which represent an increase, generally speaking, of 20% as compared to awards for comparable injuries made in earlier years and that a discernible trend of a 20% increase in awards can be seen from recent awards of the High Court.

In my judgment the deputy registrar was wrong in principle in assessing damages on that basis. The well known and long established principles which govern a court in assessing general damages for injuries sustained by a plaintiff arising out of the negligence of a defendant are still applicable and they do not permit a court to arrive at an amount it would award and then to add a percentage increase on to it because of, say, an increase in the cost of living.

In the present case, in my judgment the deputy registrar has indicated that for all the injuries sustained by the plaintiff the sum of $24,000 would be his estimate of the general damages and I am unable to say that this sum is so inadequate as to justify this court, in its appellate capacity to interfere with it. I therefore dismissed the appeal.

Order accordingly.

Solicitors: *Murphy & Dunbar; Battenberg & Talma.*

MALAYSIAN REPORTS

WONG SIAK FON v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.) June 28, 1971]

[Kota Kinabalu — Criminal Appeal No. 4 of 1971]

Criminal Law and Procedure — Appeal — Conviction on accused's own plea — No right of appeal — Court's power of revision — Sabah Criminal Procedure Code, 1959, s. 254.

Penal Code (Sabah), s. 420 — Cheating — Charge — Ingredients — Failure to particularise — Effect of.

This was an appeal against conviction and sentence.

The appellant was originally charged with the offence of promoting a collection of money in two kampongs without a licence, contrary to section 3(2) of the Public Collection Ordinance (Chapter 112). Before the close of the case for the prosecution the charge was amended to one of cheating by dishonestly inducing the delivery of an amount in cash, an offence punishable under section 420 of the Penal Code of Sabah.

The appellant pleaded guilty to this amended charge as a result of which he was convicted on his own plea and sentenced to three months imprisonment. He appealed and contended that as the charge was illegal, the conviction and sentence were null and void and that the evidence disclosed no offence in law and that there was no real plea of guilty. The respondent contended that since the appellant was convicted on his own plea he was precluded from appealing against his conviction. However, the charge was badly drafted in that it did not disclose the names of the persons cheated nor did it disclose particulars of deception.

Held: (1) under section 254 of the Sabah Criminal Procedure Code a person who was convicted on his own plea cannot appeal against his conviction as of right so long as his plea was a real plea;

(2) although the appellant had no right of appeal against his conviction the appellate court is entitled to look into the record and if there is any irregularity which occasions a failure of justice, the court will exercise its power of revision. In the circumstances of this case, the cheating charge did not particularise the deception. This was an irregularity which affected the legality of the conviction resulting in the failure of justice. Therefore in the exercise of the court's power of revision under section 282 of the Sabah Criminal Procedure Code, the conviction must be quashed and the sentence set aside.

Observations on ingredients of a cheating charge.

Per curiam: Section 305 of the Criminal Procedure Code of the Federated Malay States provides that where an accused has been convicted on his own plea there shall be no appeal except as to the extent or the legality of sentence. This section is similar to section 299 of the Straits Settlements Criminal Procedure Code and section 234 of the Singapore Criminal Procedure Code (Cap. 113, 1970 Edn.). There is no similar provision in East Malaysia (*Post* p. 204 I *l*).

[Editorial note: In *Lee Kang Wye* v. *Ng Ah Min* (1888) 4 Ky. 335. it was held that before there can be a conviction for cheating under section 417 of the Penal Code, there must be conclusive evidence of a dishonest intent at the time of obtaining the money or goods; where the evidence does not necessarily shew a dishonest intent at the time, but is consistent with such either being or not being the fact, no conviction can be had. This case was followed in *Yong Yong Peng* v. *R.* [1947] M.L.J. 40.]

Cases referred to:-

(1) *Tan Thian Sang alias Tan Yun Guan* v. *Public Prosecutor* [1959] S.C.R. 5.

(2) *Lee Yu Fah* v. *Public Prosecutor* [1937] M.L.J. 179.

(3) *Public Prosecutor* v. *Hussain & Anor.* [1970] 1 M.L.J. 37.

(4) *Hwong Tiong Cheong* v. *Public Prosecutor* (Kota Kinabalu High Court Criminal Appeal No. 12 of 1966 — Unreported).
(5) *Liew Min Poh* v. *Public Prosecutor* (1962) 3 M.C. 316.
(6) *Lew Cheok Hin* v. *Public Prosecutor* [1956] M.L.J. 133.
(7) *Lim Chin Huat* v. *R.* [1963] M.L.J. 214.
(8) *Khoo Kay Jin* v. *Public Prosecutor* [1964] M.L.J. 22, 23.

MAGISTRATE'S CRIMINAL APPEAL.

Lee Hun Hoe J.: The appellant was originally charged with the offence of promoting a collection of money at Kampong Tombutuan and Kampong Kabayau in the district of Kota Belud without a licence contrary to section 3(2) of the Public Collection Ordinance (Chapter 112). Before the close of the case for the prosecution the charge was amended to read as follows: —

"That you, Wong Siak Fon @ Koping sometime in the year 1966 at Kampong Tombutuan and Kampong Kabayau in the district of Kota Belud cheated the people of Kampong Tombutuan and Kampong Kabayau by dishonestly inducing them to deliver to you an amount of $1,650 cash and that you thereby committed an offence punishable under section 420 of the Penal Code of the Laws of Sabah."

After the charge was read and explained to him the appellant pleaded guilty to it. As a result he was convicted on his own plea and sentenced to three months' imprisonment. He now appeals against both conviction and sentence.

Briefly the facts are that in 1966 the appellant went to the two kampongs mentioned in the charge and collected money from a number of people for the purpose of buying a landrover for use there. The collection was made either by the appellant himself or through Sindi bin Giong (PW2). He told Sindi that he would form a co-operative society. O. T. Duraman bin Dajut (PW3) understood that profit made by the landrover would be distributed to the kampong people. Singkui bin Tinggi (PW1) understood the money was a loan to be paid after one year with interest. Sagun bin Golook (PW4) also understood that the money would be repaid with interest. After a year the appellant did not make the repayment so Singkui approached him for payment. Eventually he sold the landrover and paid Singkui $10. It appears that the appellant entered into an agreement with a few of the people concerned. The agreement was later given to the police and investigation followed.

The appellant contended that as the charge is illegal the conviction and sentence are null and void and that the evidence disclosed no offence in law and that there was no real plea of guilty.

The respondent opposed the appeal on the ground that since the appellant was convicted on his own plea he is precluded from appealing against his conviction. Section 305 of the Criminal Procedure Code of the Federated Malay States provides that when an accused person has been convicted on his own plea there shall be no appeal except as to the extent of the legality of sentence. This section is similar to section 299 of the Straits Settlements Criminal Procedure Code and section 234 of the Singapore Criminal Procedure Code (Capter 113, 1970 Edn.). There is no similar provision in East Malaysia.

Section 254 of the Sabah Criminal Procedure Code reads: —

"Except as provided for in section 257 the accused person, the complainant or the Public Prosecutor, if he is dissatisfied with any judgment, sentence or order pronounced by any magistrate in a criminal case or matter to which he is a party, may appeal against such judgment, sentence or order for any error in law or in fact or on the ground of inadequacy or excessive severity of the sentence."

Section 257 may be disregarded as it is not relevant to this appeal. Section 254 of the Sarawak Criminal Procedure Code is word for word the same as the Sabah provision.

In *Tan Thian Sang alias Tan Yun Guan* v. *Public Prosecutor*[1] the appellant was convicted and sentenced on his own plea to a charge of making a false statement by omitting to state certain particulars when applying for naturalisation contrary to section 3 of the British Nationality (Miscellaneous Provisions) Enactment of the Brunei Laws, Chapter 84. He appealed against both conviction and sentence. In construing section 271 of the Brunei Criminal Procedure Code (which is similar to section 254 of the Sabah Criminal Procedure Code) Briggs J. held that a person who pleaded guilty, provided always that it was a real plea, had no right of appeal since he was not a person who could be said to be "dissatisfied with the judgment of the magistrate". He further held that though the charge was clumsily worded section 153 of the Criminal Procedure Code (similar to section 139 of the Sabah Criminal Procedure Code) had been sufficiently complied with and the magistrate had jurisdiction to try the charge.

In Brunei, as in Sabah, there is nothing comparable to section 305 of the Criminal Procedure Code of the Federated Malay States or section 299 of the Criminal Procedure Code of the Straits Settlements or section 234 of the Criminal Procedure Code of Singapore. Consequently the appellant's right of appeal must depend upon the interpretation of section 254 of the Sabah Criminal Procedure Code. With respect, I agree with Briggs J., in his construction of section 271 of the Brunei Criminal Procedure Code. I take the same view that under section 254 of the Sabah Criminal Procedure Code a person who was convicted on his own plea could not appeal against his conviction as of right so long as his plea was a real plea.

The appellant pleaded guilty after the charge was read and explained to him. Also he had heard all the evidence adduced by the prosecution. At page 8 of the case record under *allocutus* he admitted he had collected a total of $1,640 through Sindi. It is true that he was not represented by counsel but up to that moment he did not make any protest or show any indication that he did not intend to plead guilty. I think the truth is that he appealed because of the term of imprisonment.

Even when a person has been convicted on his own plea of guilty and is precluded from appeal against the legality of sentence under section 305 of the Criminal Procedure Code of the Federated Malay States the appellate court can always in a proper case

exercise its power of revision under the Code: *Lee Yu Fah* v. *Public Prosecutor*;[2] See also the footnote to this section in *Mallal's* Criminal Procedure, 4th Edition, page 452. Ong Hock Sim J., (as he then was) did that in *Public Prosecutor* v. *Hussian & Anor.*[3] There the accused pleaded guilty to the charge of contravening one of the conditions of their boat licence by trawling outside the demarcation area. The charge was held to be bad and disclosed no offence as no regulations had been made by the Yang di-Pertuan Agong to demarcate any area for any particular type of fishing. Despite the plea of guilty the judge, in the exercise of his powers of revision, quashed the conviction.

In the present case although the appellant has no right of appeal against his conviction the appellate court is entitled to look into the record and, if there is any irregularity which occasions a failure of justice, the court will exercise its powers of revision. There are several unsatisfactory features in this case. The alleged offence was committed in 1966. No report was made until 1969. No charge was preferred against appellant until April, 1970. The prosecution was not sure at all what offence or offences the appellant had committed. There is evidence to indicate that the money could be merely a loan but because appellant was unable to repay it fully that the matter was referred to the police.

The appellant was alleged to have cheated the people of two kampongs of $1,650 by dishonestly inducing them to deliver the said sum to him. It is not every form of dishonesty inducing a person to deliver property that amounts to cheating but only those forms of dishonesty in which the dishonesty consists in deceiving of the person concerned. The charge did not even disclose the names of the persons cheated. It is so general that it could mean that the appellant cheated the whole population of the two kampongs which is of course not true. Further the charge did not disclose particulars of deception.

The record only shows that a few complained against appellant because they did not succeed in getting repayment of the loan. It is possible that the appellant might have cheated some of those who contributed money. But whether he is guilty or not must depend on the facts of each particular case. There must be separate charges. The charge in this case was badly drafted. In a cheating charge it is necessary to particularise the deception. I pointed this out in the case of *Hwong Tiong Cheong* v. *Public Prosecutor*[4] when I allowed an appeal in a cheating charge under section 417 of the Sabah Penal Code. I stated that the forms of charges set out in various editions of *Ratanlal's* Law of Crimes merely serve as a general guide and bear no relation to any particular set of facts. The charge must be so framed to enable an accused person to know with certainty what case he has to meet. I also referred to *Liew Min Poh* v. *Public Prosecutor*[5] where Azmi J., (as he then was) held that in a charge under section 420 of the Penal Code it was necessary to set out not only the fact that the appellant had obtained goods by dishonest means but also the deception which had been practised otherwise the charge was illegal amounting to a nullity.

Magistrates must exercise extreme care when dealing with a cheating charge. Taylor J. put it lucidly in *Lew Cheok Hin* v. *Public Prosecutor*[6] in these words: —

"The fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge. As regards cheating it is specifically enacted by section 153 (see illustration (b) of section 140 of the Sabah Criminal Procedure Code) the manner in which the victim was cheated must be set out. It is the duty of the court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and, in general, the earlier the better but it is at the close of the evidence for the prosecution that the court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower courts to consider every charge at that stage and if necessary to amend it then."

Lim Chin Huat v. *R.*[7] is an instructive case as to how particulars may be set out in respect of a charge for the offence of cheating. It was cited with approval in *Khoo Kay Jin* v. *Public Prosecutor.*[8]

In the circumstances I do not think the conviction should be allowed to stand. Failure to particularise deception in a cheating charge is an irregularity which affects the legality of the conviction resulting in the failure of justice. Therefore in the exercise of my powers of revision under section 282 of the Sabah Criminal Procedure Code I would quash the conviction. It also follows that the sentence must be set aside.

Conviction quashed.
Sentence set aside.

LIM YOW CHOON v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F. JJ.) November 6, 1971]

[Kuala Lumpur — Federal Court Criminal Reference No. 3 of 1971]

Criminal Law and Procedure — Cautioned statements — Put in as exhibit by prosecution — Whether part of prosecution case — Contradictions between caution statement and other evidence of prosecution — Whether there is case to answer.

In this case after the appeal of the appellant against his conviction and sentence on a charge under the Prevention of Corruption Ordinance, 1961 had been dismissed, on his application the High Court reserved the following questions of law for the decision of the Federal Court:

1. Whether the court should treat the cautioned statement of the accused (appellant/applicant) which was put in by way of an exhibit by the prosecution before the close of the prosecution's case, as forming part of the prosecution's case as opposed to part of the defence case, when the court was considering whether the accused should be called upon to enter into defence.
2. If the cautioned statement should be treated as forming part of the prosecution's case, in view of the contradictions between the contents of the cautioned statement and other evidence of the prosecution, whether at the close of the prosecution case the court should find that there was no case for the accused to answer.

Held: (1) the cautioned statement in the circumstances of the case must be regarded as forming part of the case for the prosecution: